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In The

Supreme Court of the United States

October Term, 1997

JOAN MAY, WILLIAM FELICELLI, JOHN RIELLY, PETER CHADMAN, VIRGINIA OGLESBY and DAVID HOLUBETZ,

Petitioners,

vs.

TOWN OF MOUNTAIN VILLAGE, a Colorado Municipal Corporation, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment require strict scrutiny for claims of vote dilution based upon state laws that expand the right to vote in general municipal elections?

PARTIES TO THE PROCEEDING

The petition fails to identify properly the parties to the proceeding. In addition to the Town, which *is* named as a respondent, Petitioners sued individual Town Council members in their official and personal capacities, and, pursuant to 42 U.S.C. § 1983, Petitioners sought both compensatory and punitive damages. The individuals sued below were Darrell Huschke, Julie Cram, David Disick, David C. Flatt, Steve Hilbert, Doug Tueller, and Linda Rodgers. Although the individual Respondents were appellees in the Tenth Circuit, Petitioners fail to identify them in the petition.

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APPENDIX

Appendix 1 — Constitution of the State of Colorado, Article XX, Section 6 ..... 1a

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Respondents, the Town of Mountain Village ("Town") and Darrell Huschke, Julie Cram, David Disick, David C. Flatt, Steve Hilbert, Doug Tueller, and Linda Rodgers, hereby respond to the Petition for Writ of Certiorari filed by Joan May, William Felicelli, John Rielly, Peter Chadman, Virginia Oglesby, and David Holubetz ("Petitioners").

CONSTITUTIONAL PROVISION INVOLVED BUT NOT SET FORTH IN PETITION

Article XX, § 6 of the Constitution of the State of Colorado provides in pertinent part:[1]

> The people of each city or town of this state . . . are hereby vested with, and they shall always have, power to make . . . the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.
>
> . . . .
>
> . . . [S]uch city or town, and the citizens thereof, shall have . . . all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:
>
> . . . .
>
> d. All matters pertaining to municipal elections in such city or town . . . including the registration of voters. . . .

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1. The full text of Article XX, § 6 is set forth in the attached Appendix 1.

I. STATEMENT OF THE CASE

Section 2.4(b) of the Town's Home Rule Charter ("Charter") extends the right to vote in the Town's local elections to owners of real property located within the Town but who are not legal residents of the Town so long as they: (a) have been owners of record for at least 30 consecutive days immediately prior to the date of the election; (b) during that 30 days owned a minimum of 50% of the fee title interest in certain real property; (c) are at least 18 years old on the date of the election; and (d) are natural persons. (App. A at 5a).[2]

A. The Town Is Unique.

The Town is located approximately 325 miles southwest of Denver in the San Juan Mountains in San Miguel County, Colorado. *Id.* at 3a. As of July 1993, all of San Miguel County had only about 4,300 permanent residents. *Id.* The Town consists of approximately 2,049 acres of land located on the side of a ski mountain adjacent to the Town of Telluride, Colorado. *Id.*

The Town lies in a picturesque box canyon at the end of a winding two-lane road. Only about 2,000 people live permanently in the valley, and it is very expensive to do so. People are not forced by circumstance to live in the area; they move there for its beauty, and for the skiing and other recreational opportunities it offers. Most of the homes in the Town are second homes, and "without the significant revenues the nonresident landowners have contributed to the Town, the Town might never have come into existence." *Id.* at 13a-14a.

The Town was developed solely in connection with the recreational opportunities created by the Telluride Ski Area. The

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2. References to "App. A or B" are to the Appendices attached to the petition.

center of the Town is located at the base of the ski area, and contains the main gondola terminal which connects the Town with Telluride, a golf course facility, single-family residential units, duplex residential units, residential condominium units, hotel rooms, commercial space for offices, restaurants, shops and services, tennis courts, a swimming pool, cross-country skiing trails, nature preserves, jogging trails, and bicycle and hiking paths. *Id.* at 3a-4a. The Charter was adopted to ensure that the special nature of the resort community would be safeguarded, that the beauty of the Town's natural surroundings would be preserved, and to encourage the recreational nature of the Town. *Id.* at 6a.

The nature of the economy and the life-style of the people of the Town are, and will in the future remain, atypical. For example, the economy of the Town is based primarily upon the resort industry and tourism. The Charter recognizes that another respect in which the Town is unusual is that many of its present and future residential property owners maintain and will continue to maintain their primary residences elsewhere. *See id.*

The Town received voter approval to incorporate under Colorado law at an election held on January 17, 1995. *Id.* at 4a. On March 7, 1995, an election was held on whether to approve the proposed Charter. Only residents of the Town who were registered to vote in San Miguel County were entitled to vote in the Charter election. The Charter was approved by 75% of the residents who voted. *Id.*[3]

The Town has approximately 568 permanent residents, of whom approximately 505 are old enough to vote. *See* App. A

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3. On March 10, 1995, the District Court in and for San Miguel County issued an Order declaring that the Town had been validly incorporated and that the Town had adopted a Home Rule Charter under the provisions of Article XX of the Colorado Constitution. App. 1 at 4a.

at 7a. In addition to the 505 potential resident voters, there are approximately 541 nonresident property owners qualified to vote pursuant to section 2.4(b) of the Charter. *Id.* Nonresidents entitled to vote under section 2.4(b) currently own over 34% of the assessed value of real property in the Town, whereas residents own only about 4%.[4] *Id.* Nonresident property owners pay over eight times more in property taxes than the residents do. *Id.* It is anticipated that in the future nonresident property owners will continue to contribute significant revenues to the Town in the form of fees, licenses, sales taxes, ad valorem property taxes, and special assessments. *Id.* The Charter grants the Town the right to establish land use standards, community services, enact municipal ordinances, adopt capital improvement programs, establish property and other taxes, borrow money, issue bonds, create special improvement districts, control public utilities and establish rates therefor, and to condemn property. *Id.* at 7a-8a. The Town clearly has the power to significantly affect the nonresident landowners. The Charter took cognizance of this singular state of affairs by granting to nonresident property owners the right to vote on issues "strictly limited in nature to Town matters."[5] *See id.* at 8a. The Charter gives nonresident landowners "a voice in the affairs of the Town, including taxes to be paid and how tax dollars will be spent." *Id.*

B. Home Rule Towns in Colorado Expressly Have Been Granted Plenary Power Over Local Elections.

As this Court has recognized, in order to address the myriad complexities facing local government, states are granted

4. About 61% of the assessed value of real property located in the Town is owned by nonresident corporations and trusts which are not entitled to vote. App. A. at 7a.

5. This limitation precludes nonresident voters from voting twice on any state or national issues.

extraordinarily wide latitude in creating various types of political subdivisions and conferring authority on them. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978). States characteristically provide for representative government at the local level, and not infrequently do so by delegating power to local units of government by "constitutional provisions for local home rule which are immune from legislative interference." *Avery v. Midland County, Tex.*, 390 U.S. 474, 481 (1968).

Colorado long ago recognized the wisdom of delegating power to local government: in 1912, Colorado enacted Article XX of the Colorado Constitution. The intent of Article XX is "to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters." COLO. CONST. art. XX, § 6. The act specifically delegates to home rule towns the power to "legislate upon, provide, regulate, conduct and control . . . all matters pertaining to municipal elections in such . . . town." COLO. CONST. art. XX, § 6(d). Section 2.4(b) was enacted pursuant to this grant of authority.

C. Petitioners Are an Ill-Defined Minority Seeking To Overturn the Vote of the Town's Residents.

When 75% of the Town's residents voted to enfranchise the nonresident landowners, they were exercising the power granted to them by Article XX, § 6 of the Colorado Constitution. Petitioners seek to override the political decision made by the Town's residents.

Petitioners' various filings below raise an obvious question: just who is seeking to vitiate the popular vote of the electorate? Petitioners filed the case originally as a class action on behalf of *all* residents of the Town. Yet, of the *residents* who voted, 75% voted to approve the Charter. The truth is that this case is

being prosecuted on behalf of an ill-defined and unrepresentative minority who have resorted to the judicial process to accomplish what they were unwilling or unable to do politically.

> In the absence of invidious discrimination, however, a court is not free under the aegis of the Equal Protection Clause to substitute its judgment for the will of the people of a State as expressed in the laws passed by their popularly elected legislatures.

Parham v. Hughes, 441 U.S. 347, 351 (1979); *see also People ex rel. Tate v. Prevost*, 134 P. 129, 133 (Colo. 1913) (certain issues best left "to be fought out on the hustings and determined by the people at the polls.").

II. REASONS FOR DENYING THE WRIT

A. There Is No Conflict Among the Circuits: Lower Courts Uniformly Have Applied Rational Basis Review to Claims of Vote Dilution Based upon Expanding the Right To Vote.

1. Decisions from the Second, Fifth, and Sixth Circuits Have Applied Rational Basis Review to State Laws that Allow Nonresident Landowners To Vote in General Municipal Elections.

The sole issue properly raised by the petition is whether the Equal Protection Clause of the Fourteenth Amendment requires that strict scrutiny invariably be applied to vote dilution claims based upon state laws that expand the right to vote in general municipal elections.[6] The Tenth Circuit properly held

6. Although the petition lists four "Questions Presented," the first and third issues are the same. The second issue — whether constitutional rights (Cont'd)

that it did not. Using rational basis review, the Tenth Circuit held section 2.4(b) constitutional because there was a rational basis to allow nonresident landowners to vote in Town elections.[7]

Petitioners concede, as they must, that there is no conflict among the circuits. The Tenth Circuit's decision is consistent with decisions from the Fifth Circuit, one of which has been affirmed by this Court. *See Glisson v. Mayor & Councilmen of Savannah Beach, Tybee Island*, 346 F.2d 135, 137 (5th Cir. 1965); *Spahos v. Mayor & Councilmen of Savannah Beach, Tybee Island, Ga.*, 207 F. Supp. 688 (S.D. Ga.), *aff'd per curiam*, 371 U.S. 206 (1962). Both decisions are indistinguishable from the present case.[8]

(Cont'd)
can be deprived by majority vote — relates to dictum in the Tenth Circuit's opinion, was not raised or argued below, and is not properly before this Court. *See, e.g., Capps v. Humble Oil & Refining Co.*, 536 F.2d 80, 82 (5th Cir. 1976) (cannot raise new theory on appeal that was not presented below). As to the fourth issue — whether section 2.4(b) is unconstitutional because the Town did not also enfranchise nonresidents who do not own land in the Town but nevertheless might be interested in participating in its elections — it too was not raised below. In addition, because Petitioners here are all residents, they lack standing to raise this argument. *See Petition* at 2 ("*residents* of the Town brought this proceeding. . . ."); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976) (injury in fact necessary to confer standing).

7. Petitioners do not challenge the Tenth Circuit's conclusion that the Town had a rational basis to enfranchise nonresident landowners.

8. *See also Angel v. City of Fairfield, Tex.*, 793 F.2d 737, 740 (5th Cir. 1986) (votes of residents not unconstitutionally diluted by allowing nonresidents to vote in general municipal elections because "[w]hen nonresidents were allowed to vote . . . all of the qualified voters were treated alike, and their respective votes were diluted to the same extent.").

Petitioners are wrong in asserting that only the Fifth Circuit has addressed the present issue. *See Petition* at 19. Although the issue rarely arises, it has been addressed by two Second Circuit cases, both of which applied rational basis review to challenges to state laws that allowed nonresidents to vote in general municipal elections. *See Collins v. Town of Goshen*, 635 F.2d 954, 959 (2d Cir. 1980) (Friendly, J.); *Clark v. Town of Greenburgh*, 436 F.2d 770, 772 (2d Cir. 1971).

The issue was also addressed in a district court case from the Sixth Circuit. *See Brown v. Board of Comm'rs of Chattanooga, Tenn.*, 722 F. Supp. 380 (E.D. Tenn. 1989). After carefully analyzing the relevant federal cases, the court in *Brown* applied rational basis review to a vote dilution claim based upon a provision in the city charter which allowed nonresidents to vote in general municipal elections. *Id.* at 398.[9] Every reported case that has addressed a vote dilution claim based upon a law which granted nonresident landowners the right to vote in general municipal elections has applied rational basis review.

2. Decisions from the Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits Have Applied Rational Basis Review to State Laws that Allow Nonresidents To Vote in Special District and School Board Elections.

As the Tenth Circuit reasoned:

> Of critical importance to any decision here is the fact that Section 2.4(b) of the Town Charter does not restrict the right to vote — it expands it to include nonresidents owning real property in the Town. As

9. Two Florida cases also held constitutional statutes that allowed nonresident property owners to vote in general municipal elections. *See Andrews v. Linden*, 284 So. 2d 398 (Fla. Ct. App. 1973); *Hisgen v. Rileigh*, 115 So. 2d 715 (Fla. Ct. App. 1959).

> pointed out by the District Court, "[w]here a law expands the right to vote causing vote dilution, the rational basis test has been applied by the vast majority of courts."

App. A at 9a-10a. As discussed above, every court that has addressed a vote dilution challenge to a law allowing nonresident landowners to vote in general municipal elections has applied rational basis review. In addition, the Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits have all applied rational basis review to vote dilution claims based upon nonresident voting in special district and school board elections. *See Creel v. Freeman*, 531 F.2d 286 (5th Cir. 1976) (school board), *cert. denied*, 429 U.S. 1066 (1977); *Duncan v. Coffee County, Tenn.*, 69 F.3d 88 (6th Cir. 1995) (school board); *Cantwell v. Hudnut*, 566 F.2d 30, 37 (7th Cir. 1977) (special district), *cert. denied*, 439 U.S. 1114 (1979); *Snead v. City of Albuquerque*, 663 F. Supp. 1084 (D.N.M.) (special district), *aff'd*, 841 F.2d 1131 (10th Cir. 1987), *cert. denied*, 485 U.S. 1009 (1988); *Davis v. Linville*, 864 F.2d 127 (11th Cir. 1989) (Superintendent of Education).[10]

A cogent analysis of the proper standard of review to apply to vote dilution claims based upon expanding the franchise is set forth in *Duncan*, 69 F.3d 88. There, the Sixth Circuit

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10. *See also Bjornestad v. Hulse (Sierra Lakes Water Dist.)*, 281 Cal. Rptr. 548 (Cal. App. 1991) (special district). Although not cited in the petition, *Locklear v. North Carolina State Board of Elections*, 514 F.2d 1152 (4th Cir. 1975), stands alone among all the federal cases in applying the compelling interest test to an Equal Protection claim of vote dilution in a school board election. *Locklear* has been discredited by *Duncan*, 69 F.3d at 94, where the Sixth Circuit found that *Locklear*'s compelling interest standard "would be unworkable," and was based "largely on the misuse of the term vote dilution." *Id. Phillips v. Beasley*, 78 F.R.D. 207 (N.D. Ala. 1978), *rev'd*, 634 F.2d 947 (5th Cir. 1981), also disapproved of, and declined to follow, *Locklear*.

observed that "[m]erely expanding the voter roles is, standing alone, insufficient to make out a claim of vote dilution." *Id.* at 94. A contrary holding would be likely to result in unconstitutional vote dilution every time the franchise is expanded. For example, in 1870, the Fifteenth Amendment extended the right to vote to all persons regardless of "race, color, or previous condition of servitude." This necessarily diluted the voting power of white males. In 1920, the Nineteenth Amendment extended the franchise to women, thereby diluting the votes of all males. And, in 1971, the Twenty-Sixth Amendment extended the franchise to persons eighteen years of age or older, thereby diluting the votes of all persons twenty-one or older. If dilution alone were sufficient to sustain an Equal Protection claim, white males twenty-one and older might be the only persons entitled to vote in the United States. Of course, this would be absurd. As explained in *Duncan*:

> Naturally, any time voters are added to the rolls . . . those already on the rolls have had their votes diluted. Therefore, "vote dilution" is properly understood to be a constitutional term of art. As such, mere expansion of the class of persons eligible to vote does not, *per se*, imply unconstitutional vote dilution.

Duncan, 69 F.3d at 94 n.3. It is only when there is not a rational reason to extend the franchise that unconstitutional vote dilution occurs. *Id.* at 94.

Duncan elucidates the policy which requires that rational basis review be applied to laws that *expand* the franchise:

> We conclude that the systematic use of the compelling state interest test in cases such as this would be unworkable, and is not constitutionally required. . . . Merely expanding the voter roles is, standing alone,

> insufficient to make out a claim of vote dilution. The reason for this conclusion can best be illustrated by an example. If a political entity elects to alter its voting requirements, for example by lowering the voting age, it will expand the voting rolls. This dilutes the votes of those already registered to vote. But it does not do so unconstitutionally, even though the state does not have a compelling state interest in lowering the voting age. Similarly, if a state cut its durational residence requirement in half, it would expand the rolls, but there would still not be an unconstitutional dilution of votes even though the state did not have a compelling state interest in altering the old residence requirement.
>
> To hold otherwise would . . . make any expansion of the voting rolls subject to attack because the state did not have a compelling state interest warranting the change. This would leave the scope of the franchise static and virtually unchangeable.

Duncan, 69 F.3d at 94-95.

There are strong reasons to apply only rational basis review to state laws that expand the franchise. As recognized by the court in *Bjornestad*, "[i]n the rational basis cases, the election laws expand rather than restrict the franchise. . . . [A] strict scrutiny approach may hamper the creation of innovative local government units." 281 Cal. Rptr. at 562. Applying strict scrutiny would also impede local governments from expanding the voting rolls to include more people in the political process, and would unnecessarily limit the extraordinarily wide latitude granted to local government. *See Holt*, 439 U.S. at 71.

B. The Tenth Circuit's Decision Is Correct, and Is Not Contrary to any Relevant Decisions of this Court.

Petitioners contend that the Tenth Circuit ignored "consistent decisions of this Court" that establish an "inviolate principle that residents, and only residents, elect their government." Petition at 6. Petitioners argue that "an unbroken string of cases" required the lower court to apply strict scrutiny. *Id.* at 8. Petitioners are wrong on both counts.

First, there is no authority — and Petitioners cite none — which grants residents the exclusive right to elect local government officials. *See, e.g., Bobo v. Mayor of Savannah Beach, Tybee Island*, 114 S.E. 2d 374, 376 (Ga.), *cert. denied*, 364 U.S. 409 (1960).

Second, although the Court indicated in *Burdick v. Takushi*, 504 U.S. 428 (1992), that voting is of "fundamental significance under our constitutional structure," it nevertheless held that not every voting regulation is subject to strict scrutiny.[11] *Id.* at 433. Petitioners here, like the petitioner in *Burdick*, "proceed[ ] from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold." *Id.* at 432; *see also Bullock v. Carter*, 405 U.S. 134, 143 (1972) ("not every limitation or incidental

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11. *See also Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (the "Court has often noted that the Constitution 'does not confer the right of suffrage upon any one,' and that 'the right to vote, *per se*, is not a constitutionally protected right.' "; quoting *Minor v. Happersett*, 21 Wall 162 (1875), and *San Antonio Independent School Dist. v. Rodriquez*, 411 U.S. 1, 35 (1973)); *Greenwood v. Singel*, 823 F. Supp. 1207, 1212 (E.D. Pa. 1993) (rejecting argument that strict scrutiny applies to all statutes concerning the electoral process); *Snead*, 663 F. Supp. at 1087 ("Simply because the issue involved voting classifications [is] insufficient to" require strict scrutiny).

burden on the exercise of voting rights is subject to a stringent standard of review."); *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 806-09 (1969).

Petitioners rely on two lines of cases in an attempt to evade the virtually unanimous authority that has applied rational basis review to vote dilution claims challenging state laws that expand the right to vote. The first line consists of cases in which residents have been precluded from voting. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972), *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Evans v. Corman*, 398 U.S. 419 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966). The second line consists of apportionment cases in which the votes of residents have been weighted differentially. *See, e.g., Board of Estimate of City of New York v. Morris*, 489 U.S. 688 (1989); *Abate v. Mundt*, 403 U.S. 182 (1971); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

The strict scrutiny applied to classifications which *exclude* otherwise qualified residents from voting has been rejected repeatedly where, as here, the challenged law *expands* the franchise. *E.g., Duncan*, 69 F.3d 88; *Collins*, 635 F.2d at 957-58; *Brown*, 722 F. Supp. at 398; *Snead*, 663 F. Supp. at 1087; *Spahos*, 207 F. Supp. at 692; *Bjornestad*, 281 Cal. Rptr. at 562.

The apportionment cases are similarly inapposite. As the Seventh Circuit held in *Cantwell*, *Reynolds* and the other apportionment cases do not apply when the alleged evil is the expansion of the franchise and not differential weighting. 566 F.2d at 37.

> *Reynolds v. Sims* and its progeny were concerned with equalizing deviations from the equal population

> principle in voting districts. These cases do not say that an economic interest, such as property ownership, is an impermissible criterion for apportioning voting power in municipal elections.

Brown, 722 F. Supp. at 398 ("*Over* inclusiveness is a lesser constitutional evil than *under* inclusiveness."); *Bjornestad*, 281 Cal. Rptr. at 562-63. Petitioners do not challenge the Tenth Circuit's finding that "[t]here is no evidence in this case of any suspect classification of voters and equal weight is to be given to the votes of residents and nonresidents." App. A at 14a. Accordingly, the Tenth Circuit's application of rational basis review is consistent with all relevant decisions of this Court, and with the overwhelming weight of authority.

Finally, relying on *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), and *Ball v. James*, 451 U.S. 355 (1981), Petitioners contend that the Tenth Circuit erred in applying rational basis review because all laws affecting voting in general as opposed to special district elections must be scrutinized strictly.[12] *Petition* at 8-9. Both *Salyer* and *Ball* involved challenges to state laws that limited voting in special district elections to landowners (whether or not they resided within the district). Petitioners in both cases were *residents* who were *denied the right to vote* because they did not own real property. In both cases, the Court applied rational basis review and upheld the exclusion of residents from voting. On the other hand, the Court has held that strict scrutiny is appropriate for laws that excluded residents and allowed only property owners to vote in school district elections, *Kramer*, 395 U.S. 621, elections to approve the issuance of revenue bonds to finance

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12. Petitioners' argument that strict scrutiny must apply to any law relating in any way to voting in general elections is refuted by *Burdick*, 504 U.S. 428, *Rodriguez*, 457 U.S. 1, *Greenwood*, 823 F. Supp. 1207, and *Snead*, 663 F. Supp. 1084.

local improvements, *Cipriano*, 395 U.S. 701, and elections to approve the issuance of general obligation bonds, *Kolodziejski*, 399 U.S. 204.[13]

These cases are easily harmonized: laws that *exclude residents* from voting in general municipal elections are reviewed using strict scrutiny; laws that *exclude residents* from voting in special districts are reviewed using the rational basis test. These cases do not address the standard of review to apply to vote dilution claims based upon *expanding* the franchise to allow nonresident property owners to vote in general municipal elections. The cases which *have* addressed this issue uniformly apply rational basis review. *E.g.*, *Angel*, 793 F.2d 737; *Collins*, 635 F.2d 954; *Clark*, 436 F.2d 770; *Glisson*, 346 F.2d 135; *Brown*, 722 F. Supp. 380; *Spahos*, 207 F. Supp. 688; *Bobo*, 114 S.E. 2d 374. The nature of the election does not determine the standard of review; instead, the standard of review depends on whether the law *expands* or *restricts* the franchise, and whether it discriminates against similarly situated voters. There is no conflict between this Court's opinions and the Tenth Circuit's decision.

C. The Present Issue Rarely Arises.

Not since *Spahos* in 1962 has the present issue come before the Court, and only a handful of federal cases have addressed it since then. That few cases have addressed the issue confirms that it arises infrequently. Very few municipalities have chosen to enfranchise nonresident landowners, and there is no indication that the Tenth Circuit's decision will lead to additional municipalities doing so. Except for Chattanooga, Tennessee, only tiny resort communities which contain a high percentage

13. The Court has characterized these elections as relating to "the operations of traditional municipalities exercising the full range of normal governmental powers." *Ball v. James*, 451 U.S. at 367 n.11.

of vacation homes have extended the right to vote in general municipal elections to nonresidents. Accordingly, the Tenth Circuit's decision is not likely to have broad implication.

D. Even if the Present Issue Were Certworthy, this Would Not Be an Appropriate Case To Review because Petitioners Expressly Conceded Below that Strict Scrutiny Was Not the Appropriate Standard of Review.

Twice below Petitioners conceded that strict scrutiny did not and should not apply. First, in briefing before the district court, Petitioners conceded that "the standard usually applied in cases where over-inclusion in the franchise is claimed is the rational basis test."[14] Second, at oral argument on the parties' cross motions for partial summary judgment, Petitioners again conceded that strict scrutiny did not apply:

> THE COURT: Well, do you concede, Mr. Satlow [counsel for Petitioners], that I should apply the rational basis test under these facts?
>
> MR. SATLOW: No. I don't argue — I would love to argue for the strict scrutiny test. *I won't argue for it here.* I think the vast majority of courts have said that strict scrutiny doesn't apply. . . .

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14. Petitioners argued that "it would be appropriate to use an intermediate standard of scrutiny in cases involving vote dilution by alleged over-inclusion in the franchise in a general government," and suggested that this intermediate scrutiny test "might be borrowed from the gender cases." *See also* App. 2 at 6a. Petitioners never cited any authority to support their suggestion that the district court create new Equal Protection law in order to apply intermediate scrutiny to voting rights claims. There is no such authority.

Appendix 2 at 6a (emphasis added).[15] Having twice conceded below that strict scrutiny did not apply, Petitioners should not be heard to press that argument here. *See, e.g., Alexander v. Town & Country Estates, Inc.*, 535 F.2d 1081, 1082 (8th Cir. 1976); *Castleberry v. NRM Corp.*, 470 F.2d 1113, 1120 (10th Cir. 1972).

III. CONCLUSION

The petition should be denied.

Respectfully submitted,

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15. Petitioners filed the excerpt of the "Oral Argument Transcript of Proceedings" that is attached as Appendix 2 with the Tenth Circuit as part of their Appendix.

APPENDIX 1 — CONSTITUTION OF THE STATE OF COLORADO, ARTICLE XX, SECTION 6

Section 6. Home rule for cities and towns. The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the state of Colorado or said city or town, are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

Proposals for charter conventions shall be submitted by the city council or board of trustees, or other body in which the legislative powers of the city or town shall then be vested, at special elections, or at general, state or municipal elections, upon petition filed by qualified electors, all in reasonable conformity with section 5 of this article, and all proceedings thereon or thereafter shall be in reasonable conformity with sections 4 and 5 of this article.

From and after the certifying to and filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this article, such city or town, and the citizens thereof, shall have the powers set out in sections 1, 4 and 5 of this article, and all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:

Appendix 1

a. The creation and terms of municipal officers, agencies and employments; the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees;

b. The creation of police courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of police magistrates therefor;

c. The creation of municipal courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of the officers thereof;

d. All matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof, including the calling or notice and the date of such election or vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, the form of ballots, balloting, challenging, canvassing, certifying the result, securing the purity of elections, guarding against abuses of the elective franchise, and tending to make such elections or electoral votes non-partisan in character;

e. The issuance, refunding and liquidation of all kinds of municipal obligations, including bonds and other obligations of park, water and local improvement districts;

f. The consolidation and management of park or water districts in such cities or towns or within the jurisdiction thereof; but no such consolidation shall be effective until approved by the vote of a majority, in each district to be consolidated, of the qualified electors voting therein upon the question;

g. The assessment of property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special assessments for local improvements; such assessments, levy and collection of taxes and special assessments to be made by municipal officials or by the county or state officials as may be provided by the charter;

h. The imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter.

It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

All provisions of the charters of the city and county of Denver and the cities of Pueblo, Colorado Springs and Grand Junction, as heretofore certified to and filed with the secretary of state, and of the charter of any other city heretofore approved by a majority of those voting thereon and certified to and filed with the secretary of state, which provisions are not in conflict with this article, and all elections and electoral votes heretofore had under and pursuant thereto, are hereby ratified, affirmed and validated as of their date.

Appendix 1

Any act in violation of the provisions of such charter or of any ordinance thereunder shall be criminal and punishable as such when so provided by any statute now or hereafter in force.

The provisions of this section 6 shall apply to the city and county of Denver.

This article shall be in all respects self-executing.

APPENDIX 2 — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED SEPTEMBER 18, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

96 D 126

JOAN MAY, et al.,

Plaintiffs,

vs.

TOWN OF MOUNTAIN VILLAGE, et al.,

Defendants.

ORAL ARGUMENT
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE WILEY Y. DANIEL, U. S. District Judge for the District of Colorado, beginning at 2:05 p.m. on the 18th day of September, 1996, in Courtroom C-200, United States Courthouse, Denver, Colorado.

APPEARANCES

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Appendix 2

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* * *

[22] THE COURT: Well, do you concede, Mr. Satlow, that I should apply the rational basis test under these facts?

MR. SATLOW: No. I don't argue — I would love to argue for the strict scrutiny test. I won't argue for it here. I think the vast majority of courts have said that strict scrutiny doesn't apply. First, I think under the rational basis test, I don't think there's a rational basis that's related to voting in general elections, and that's what it's about, not do they own property in the town, do they have an interest in the town, do they have a financial stake. That might apply for property tax elections. It certainly doesn't apply for voting for the town council. And otherwise, it says money buys a vote.

But we have argued that the Court should apply a different standard. Rational basis is clearly not appropriate if it allows anything. And when you deal not with which district overlaps which one and how many people and how much money goes back and forth and how many school programs or things of that sort are interrelated, but you're [23] dealing with a municipality, a general unit of government, there has to be a different test. And the test we've suggested is an intermediate level scrutiny, and I'll come to that. Before I leave the rational basis, let me say again no case has said, has approved voting by non-resident landowners in general elections where they don't live in the county where the town is located.

But with that said, let me go on to what we've urged. If the Court can't reject this practice under the rational basis test, and I think it should be able to, it should use an intermediate level of scrutiny. And that has been defined as a substantial relationship to an important governmental interest, and that's used in cases, principally gender, but in cases where the class is not suspect. We don't have a suspect class. But the use of the class, in effect, may be a distinction without a difference, and we've cited in our reply brief — and the rejoinder was that we had cited no cases. Well, there were cases cited there and that was kind of the last minute as we were putting the brief together, but I wanted to bring a couple cases that were cited there and just say very briefly what they did, although again they're in the treatise.

Craig v. Boron (phonetic), 429 U.S. 190 in 1976, and it threw out a statute prohibiting the sale of 3.2 beer to males under age 21, while females at the age of 18 could [24] buy it. *Mississippi University for Women versus Hogan,* 458 U.S. 718, 1982, threw out for women only nursing school admission practice. And *Orr v. Orr* at 440 U.S. 268 in 1979, threw out a statute providing for alimony for wives but never for a husband. And these all used a substantial relationship, there had to be an important governmental interest, and the practice or the statute had a substantial relationship, or substantial relationship to that.

The rational basis test is appropriate for general economic benefits, for what government does in general, for social and economic welfare, but not for individual rights like voting. And where you have a fundamental right, where you know residents have to be allowed to vote from a host of cases in general elections and school board cases, et cetera, to allow a great many non-residents in changes the franchise, changes it for them, limits their franchise, reduces their vote just as much as mal-apportionment does.

Appendix 2

And if you look at it in very linear terms and say every person who is allowed to vote gets the same vote, so it doesn't matter, it's not like not counting all their votes, which was the analogy used in the early reapportionment cases, it isn't like — you know, they could count us in, they get the same number of representatives. You could look at it that way, but that's a very rigid test.

What's really happening here is the votes of [25] residents are being reduced by half or more. And I wish I could go into Colorado law, because Colorado has never approved it, but let me say about Colorado law only this. Those cases — in all those cases, the state had either by the legislature approving a charter, as in Savannah Beach, or by statute, the state allowed this kind of voting, and again it was for non-residents who lived in the county. But the state approved the practice. The state hasn't approved anything. This isn't an experiment by the state. This is one town in the mountains of Southwestern Colorado saying we're home rule so we can do anything we want. If we were a special district, we know we couldn't do it, and we have a special — take a metro-services district or a metro district, and one of them I know is for the gondola, but I must say I have not — for the ski area, but I'm not completely familiar with it.

But they said we have a special district, they have to live in the State of Colorado to vote. The homeowners association doesn't get to make general rules. A special district doesn't get to make all kinds of general rules, whether criminal or civil, as long as they're local. You know, they're limited in their functions, and that's why the Supreme Court and other courts have given wide sway to hold voting can be done in special district. But there's something special about a town. There's some reason they wanted a town, there's something special in why the [26]

plaintiffs want to be able to control their own town, and they don't have to prove that the non-residents vote differently than they do. They just have to prove that non-residents don't live there, that they own — yes, they own a lot of property, but no, they don't — they haven't said I'm going to change my residence.

You don't have to live there year round, because residency is a matter of intent in Colorado, as in most states, you don't have to live there year round to be a resident. You have to say this is my home, if I'm Oprah Winfrey or Donald Trump and Sylvester Stallone or someone else and I live somewhere else, I live in New York part of the year and that's not my main home, I live in Philadelphia or Chicago or L.A. or wherever it is only part of the year, but that's not really my home. My home is Mountain Village and they declare it.

I don't think it's too much to ask people to get to vote, to declare this is my home, this is my community, I'm part of the community. Because otherwise, you have people whose stake is purely financial. And, again, they could do all those things through special district, all the things that are purely financial through special districts and homeowners associations.

So we urge the Court not to approve this practice and to stop it before it spreads and to stop it right here.

* * *